

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

JOSEPH A. RODRIGUEZ,

Plaintiff,

vs.

AMERICAN POSTAL WORKERS UNION,  
AFL-CIO,

Defendant.

Case No. 2:09-cv-00506-JCM-GWF

**ORDER and FINDINGS  
AND RECOMMENDATIONS**

This matter is before the Court on Plaintiff's Amended Complaint (Dkt. #5), filed May 6, 2009.

**BACKGROUND**

Plaintiff is a former U.S. Postal Service employee who alleges that he was terminated from his position with the United States Post Office ("Post Office") due to discriminatory policies in violation of 29 U.S.C. §§ 621-634 and 42 U.S.C. §§ 2000e - 2000e17. (Dkt. #5). The Amended Complaint alleges that Defendant American Postal Workers Union ("APWU") permitted the Post Office to use a "Last Chance Agreement" for Hispanic workers and workers over the age of fifty (50), which is allegedly in contravention of the APWU national agreement. (Dkt. #5 at 5). Plaintiff states that he had a good performance record as an employee with the Post Office for twenty-two (22) years, but that when he turned forty-nine (49) he was asked to sign a Last Chance Agreement, which Plaintiff alleges is an agreement reserved for poorly-performing employees. (*Id.*) In addition, Plaintiff states that the APWU failed to represent Plaintiff in disciplinary hearings as part of Defendant APWU's policy of assisting the Post Office to eliminate employees who are close to retirement. (*Id.*)

1 Based on these allegations, on March 16, 2009, Plaintiff filed an Application to Proceed *In*  
2 *Forma Pauperis* (Dkt. #1) and attached a Civil Rights Complaint pursuant to 42 U.S.C. § 1983  
3 (Dkt. #4). The Court granted Plaintiff *in forma pauperis* status for this action. (Dkt. #3).  
4 However, the Court dismissed Plaintiff's § 1983 Civil Rights Complaint without prejudice for  
5 failure to state a claim upon which relief could be granted. (*Id.*) Plaintiff's Complaint named the  
6 AFWU as a defendant, but failed to demonstrate that Defendant constituted a state actor who could  
7 be sued under § 1983. (*See* Dkt. #4). The Court granted Plaintiff leave to amend his complaint.  
8 (Dkt. #3). In response, Plaintiff filed the present Amended Complaint (Dkt. #5), which alleges  
9 that the AFWU's actions constitute age discrimination as prohibited by  
10 29 U.S.C. §§ 621-634 and racial discrimination as prohibited by 42 U.S.C. §§ 2000e - 2000e17.

### 11 DISCUSSION

12 Pursuant to 28 U.S.C. § 1915(e), the Court must screen a complaint when the Plaintiff is  
13 proceeding *in forma pauperis*. Specifically, federal courts are given the authority to dismiss a case  
14 if the action is legally "frivolous or malicious," fails to state a claim upon which relief may be  
15 granted, or seeks monetary relief from a party who is immune from such relief. 28 U.S.C. §  
16 1915(e)(2). A complaint, or portion thereof, should be dismissed for failure to state a claim upon  
17 which relief may be granted "if it appears beyond a doubt that the plaintiff can prove no set of facts  
18 in support of his claims that would entitle him to relief." *Buckey v. Los Angeles*, 968 F.2d 791,  
19 794 (9th Cir. 1992). A complaint may be dismissed as frivolous if it is premised on a nonexistent  
20 legal interest or delusional factual scenario. *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989).  
21 Moreover, "a finding of factual frivolousness is appropriate when the facts alleged rise to the level  
22 of the irrational or the wholly incredible, whether or not there are judicially noticeable facts  
23 available to contradict them." *Denton v. Hernandez*, 504 U.S. 25, 33 (1992). When a court  
24 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the complaint  
25 with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the  
26 deficiencies could not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th  
27 Cir. 1995).

28 ...

1           **I.       Age Discrimination Claim**

2           Under 29 U.S.C. § 623(c), a labor organization may not discriminate based on a member's  
3 age or cause an employer to discriminate based on an employee's age. Plaintiff's Amended  
4 Complaint states that Defendant APWU has a policy of discriminating against union members that  
5 are approaching retirement and assisted the Post Office in dismissing these members as  
6 employees. (Dkt. #5 at 5). In support of this allegation, Plaintiff states that he worked for the Post  
7 Office for twenty-two (22) years and had a good employee performance rating. (*Id.*) However,  
8 when Plaintiff turned forty-nine (49), the Post Office allegedly forced Plaintiff to sign a Last  
9 Chance Agreement, which Plaintiff alleges is an agreement reserved for poorly-performing  
10 employees. (*Id.*) According to the Amended Complaint, Defendant APWU failed to represent  
11 Plaintiff in the negotiation of the Last Chance Agreement and failed to defend Plaintiff in  
12 subsequent disciplinary meetings. (*Id.*) Plaintiff alleges that these failures to protect Plaintiff as a  
13 union member is representative of Defendant APWU's discriminatory policy to not support or  
14 defend union members nearing retirement. (*Id.*) The Court finds Plaintiff has stated sufficient  
15 allegations to pursue a claim for age discrimination under 29 U.S.C. § 623(c).

16           **II.       Race Discrimination Claim**

17           42 U.S.C. § 2000e-2(c) prohibits a labor organization from discriminating, or causing an  
18 employer to discriminate, based on a union member's race. Plaintiff's Amended Complaint claims  
19 that Defendant APWU discriminated against him on account of his being Hispanic. However,  
20 Plaintiff states no allegations to support his claim that racial bias motivated Defendant APWU's  
21 decision not to assist Plaintiff in the negotiation of the Last Chance Agreement or defend him in  
22 subsequent disciplinary meetings. (*See id.*) The Amended Complaint alleges that the actions or  
23 inactions of Defendant APWU were the result of a policy to not support members who were  
24 nearing retirement, but contains no allegations that the union had a similar policy for persons of  
25 Hispanic decent. (*See id.*) As a result, Plaintiff has failed to provide a sufficient basis to bring a  
26 claim under 42 U.S.C. § 2000e-2(c). The Court will recommend that Plaintiff's racial  
27 discrimination claim be dismissed with prejudice as the Court has previously granted Plaintiff  
28 leave to amend and Plaintiff has been unable to cure the deficiencies in this claim.

### 1           **III.       Defendant AFL-CIO**

2           It appears to the Court that a clerical error has led to the AFL-CIO being named as a  
3 defendant in this matter. In Plaintiff's Complaint (Dkt. #4) and Amended Complaint (Dkt. #5),  
4 Plaintiff refers to the "American Postal Workers Union, AFL-CIO" as a defendant. As Plaintiff's  
5 Complaint and Amended Complaint never discuss the AFL-CIO or its officers as being involved  
6 in the subject events leading to the filing of this lawsuit, the Court interprets Plaintiff's phrasing  
7 "American Postal Workers Union, AFL-CIO" as naming the APWU as a defendant by including  
8 the APWU's membership in the AFL-CIO as part of APWU's name. (Dkt. #s 4-5). The Court  
9 will order that the AFL-CIO be dismissed without prejudice as a defendant to this action.

10          The screening of Plaintiff's Amended Complaint (Dkt. #5) pursuant to 28 U.S.C. § 1915(e)  
11 has been completed. Accordingly,

12          **IT IS HEREBY ORDERED** that Plaintiff has alleged a viable cause of action and may  
13 pursue his age discrimination claim pursuant to 29 U.S.C. § 623(c) against Defendant American  
14 Postal Workers Union.

15          **IT IS FURTHER ORDERED** that Defendant AFL-CIO is **dismissed** from this action  
16 without prejudice.

17          **IT IS FURTHER ORDERED** that the Clerk of the Court shall issue summons to  
18 Defendant American Postal Workers Union and deliver same to the U.S. Marshal for service.

19          **IT IS FURTHER ORDERED** that Plaintiff shall have twenty (20) days in which to furnish  
20 to the U.S. Marshal the required Form USM-285. Within twenty (20) days after receiving from  
21 the U.S. Marshal a copy of the Form USM-285 showing whether service has been accomplished,  
22 Plaintiff must file a notice with the Court identifying whether defendant was served. If Plaintiff  
23 wishes to have service again attempted on an unserved defendant, then a motion must be filed with  
24 the Court identifying the unserved defendant and specifying a more detailed name and/or address  
25 for said defendant, or whether some other manner of service should be attempted. Plaintiff shall  
26 complete service upon Defendant within one hundred twenty (120) days from the date that this  
27 Order is entered.

28          ...

